

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

CONCERNED FRIENDS OF FERRY
COUNTY and DAVID L. ROBINSON,

Petitioners,

v.

FERRY COUNTY,

Respondent.

Case Nos. 97-1-0018 and 06-1-0003

COMPLIANCE ORDER

I. SYNOPSIS

On October 7, 2011, the Board held a Compliance Hearing in Republic, Washington. The Board finds and concludes that Ferry County is not in compliance with the requirements of the Growth Management Act relating to: (1) including the Best Available Science in designating and protecting Fish and Wildlife Habitat Conservation Areas under RCW 36.70A.170, RCW 36.70A.060(2), and RCW 36.70A.172, and (2) including the Best Available Science in protecting Wetlands under RCW 36.70A.060(2) and RCW 36.70A.172.

II. BURDEN OF PROOF

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.¹ After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.² For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger

¹ RCW 36.70A.300(3)(b).

² RCW 36.70A.330(1) and (2).

1 to establish that the new adoption is clearly erroneous in view of the entire record before the
2 board and in light of the goals and requirements of this chapter.³

3 In order to find the County's action clearly erroneous, the Board must be "left with the firm
4 and definite conviction that a mistake has been made."⁴

5 Within the framework of state goals and requirements, the Board must grant deference to
6 local governments in how they plan for growth:

7 In recognition of the broad range of discretion that may be exercised by counties
8 and cities in how they plan for growth, consistent with the requirements and goals
9 of this chapter, the legislature intends for the boards to grant deference to the
10 counties and cities in how they plan for growth, consistent with the requirements
11 and goals of this chapter. Local comprehensive plans and development
12 regulations require counties and cities to balance priorities and options for action
13 in full consideration of local circumstances. The legislature finds that while this
chapter requires local planning to take place within a framework of state goals
and requirements, the ultimate burden and responsibility for planning,
harmonizing the planning goals of this chapter, and implementing a county's or
city's future rests with that community. RCW 36.70A.3201 (in part).

14 In sum, during compliance proceedings the burden remains on the Petitioner to overcome
15 the presumption of validity and demonstrate that any action taken by the County is clearly
16 erroneous in light of the goals and requirements of Chapter 36.70A RCW (the Growth
17 Management Act).⁵ Where not clearly erroneous and thus within the framework of state
18 goals and requirements, the planning choices of the local government must be granted
19 deference.

20 **III. PROCEDURAL HISTORY**

21 On October 7, 2011, the Board held a Compliance Hearing in Republic, Washington
22 involving three coordinated cases: Case Nos. 97-1-0018, 01-1-0019, and 06-1-0003. The
23 hearing panel for deciding these three cases is comprised of Raymond L. Paolella,

24 ³ RCW 36.70A.320(1), (2), and (3).

25 ⁴ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

⁵ RCW 36.70A.320(2).

1 Presiding Officer, and Board members Joyce Mulliken and Margaret Pageler. Petitioners
2 were represented at the Compliance Hearing by Tim Trohimovich, attorney for Futurewise,
3 and David Robinson, pro se. Respondent was represented at the Compliance Hearing by
4 Brian D. Amsbary, attorney for Ferry County. Scott L. Simmons appeared at the
5 Compliance Hearing on behalf of Riparian Owners of Ferry County and the Ferry County
6 Cattleman's Association, Intervenor limited to Case No. 01-1-0019.

7 At the October 7, 2011 hearing, Mr. Simmons informed the Board that Intervenor had not
8 been served with the prehearing briefing in these cases. Mr. Simmons moved to strike all of
9 the prehearing briefing. The Board denied this motion to strike briefing, but the Board
10 provided Mr. Simmons and the other parties with an opportunity to submit post-hearing
11 briefing by October 21, 2011. Also, Mr. Simmons presented oral argument at the October 7
12 Compliance Hearing limited to Case No. 01-1-0019.

13 This Compliance Order decides the compliance issues presented in Case Nos. 97-1-0018
14 and 06-1-0003. Case No. 01-1-0019 (Agricultural Lands of Long Term Commercial
15 Significance) will be decided in a separately issued Compliance Order.

16 IV. DISCUSSION

17 A. FISH AND WILDLIFE HABITAT CONSERVATION AREAS

18 1. Applicable Law

19 Each county shall designate where appropriate: "Critical areas." RCW 36.70A.170(1)(d).

20 The term "Critical areas" is defined as including the following areas and ecosystems:

- 21 (a) wetlands;
- 22 (b) areas with a critical recharging effect on aquifers used for potable water;
- 23 (c) fish and wildlife habitat conservation areas;
- 24 (d) frequently flooded areas; and
- 25 (e) geologically hazardous areas.⁶

26 ⁶ RCW 36.70A.030(5).

1 Each county shall adopt development regulations that protect designated critical areas.

2 RCW 36.70A.060(2). The term “development regulations” is defined as:

3 the controls placed on development or land use activities by a county or city, including,
4 but not limited to, zoning ordinances, critical areas ordinances, shoreline master
5 programs, official controls, planned unit development ordinances, subdivision
6 ordinances, and binding site plan ordinances together with any amendments thereto. A
7 development regulation does not include a decision to approve a project permit
8 application, as defined in RCW 36.70B.020, even though the decision may be expressed
9 in a resolution or ordinance of the legislative body of the county or city.⁷

10 Development regulations shall be consistent with and implement the comprehensive plan.

11 RCW 36.70A.040(4)(d).⁸

12 In designating and protecting critical areas, the GMA requires that “counties and cities shall
13 include the best available science in developing policies and development regulations to
14 protect the functions and values of critical areas. In addition, counties and cities shall give
15 special consideration to conservation or protection measures necessary to preserve or
16 enhance anadromous fisheries.” RCW 36.70A.172(1).

17 Evidence of the best available science must be included in the record and must be
18 considered substantively in the development of critical areas policies and regulations.⁹

19 “Although BAS does not require the use of a particular methodology, at a minimum BAS
20 requires the use of a scientific methodology.”¹⁰ Although a county need not develop
21 scientific information through its own means, it must rely on scientific information and must
22 analyze that information using a reasoned process.¹¹ Department of Commerce Guidelines
23 state that a county should address on the record “the relevant sources of best available
24 scientific information included in the decision-making.”¹²

25 ⁷ RCW 36.70A.030(7).

26 ⁸ See also RCW 36.70A.060(3), RCW 36.70A.120; and RCW 36.70A.130(1)(d).

⁹ *Honesty in Env'tl. Analysis & Legislation (HEAL) v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

¹⁰ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824, 837 (2005).

¹¹ *Id.* at 836-837.

¹² WAC 365-195-915(1)(b).

1 If a county chooses to disagree with or ignore scientific recommendations and resources
2 provided by state agencies or Indian tribes, which a county could do, the county must
3 unilaterally develop and obtain valid scientific information.¹³ The GMA does not require a
4 county to follow BAS; rather it is required to "include" BAS in its record. A county may depart
5 from BAS if it provides a reasoned justification for such departure.¹⁴

6 RCW 36.70A.170(2) provides that in making critical areas designations, counties and cities
7 shall consider the guidelines established by the Department of Commerce pursuant to RCW
8 36.70A.050(1). Under RCW 36.70A.050, these are "minimum guidelines" that apply to all
9 jurisdictions "to guide the classification" of critical areas. The Department of Commerce
10 "minimum guidelines" are codified in WAC Chapter 365-190.

11 WAC 365-190-030(6)(a) defines Fish and Wildlife Habitat Conservation Areas as follows:

12 "Fish and wildlife habitat conservation areas" are areas that serve a critical role in
13 sustaining needed habitats and species for the functional integrity of the ecosystem, and
14 which, if altered, may reduce the likelihood that the species will persist over the long
15 term. These areas may include, but are not limited to, rare or vulnerable ecological
16 systems, communities, and habitat or habitat elements including seasonal ranges,
17 breeding habitat, winter range, and movement corridors; and areas with high relative
18 population density or species richness. Counties and cities may also designate locally
19 important habitats and species.

20 WAC 365-190-130(1) states:

21 "Fish and wildlife habitat conservation" means land management for maintaining
22 populations of species in suitable habitats within their natural geographic distribution so
23 that the habitat available is sufficient to support viable populations over the long term
24 and isolated subpopulations are not created. This does not mean maintaining all
25 individuals of all species at all times, but it does mean not degrading or reducing
26 populations or habitats so that they are no longer viable over the long term. Counties
and cities should engage in cooperative planning and coordination to help assure long
term population viability.

Fish and wildlife habitat conservation areas contribute to the state's biodiversity and
occur on both publicly and privately owned lands. Designating these areas is an
important part of land use planning for appropriate development densities, urban growth

¹³ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d 824, 836 (2005).

¹⁴ *Swinomish Indian Tribal Community et al. v. WWGMHB et al.*, 161 Wn.2d 415, 430-431 (2007).

1 area boundaries, open space corridors, and incentive-based land conservation and
2 stewardship programs.

3 Under WAC 365-190-130(2), Fish and Wildlife Habitat Conservation Areas that must be
4 considered for classification and designation include *inter alia*:

- 5 (a) Areas where endangered, threatened, and sensitive species have a primary
6 association;
- 7 (b) Habitats and species of local importance, as determined locally; . . .
- 8 (e) Naturally occurring ponds under twenty acres and their submerged aquatic beds that
9 provide fish or wildlife habitat;
- 10 (f) Waters of the state; . . .

11 When classifying and designating fish and wildlife habitat conservation areas, counties must
12 include best available science and should consider *inter alia*:

13 Evaluating land uses surrounding ponds and fish and wildlife habitat conservation areas
14 that may negatively impact these areas, or conversely, that may contribute positively to
15 their function, and

16 Establishing buffer zones around these areas to separate incompatible uses from habitat
17 areas.¹⁵

18 WAC 365-190-080(4) provides in pertinent part as follows:

19 Counties and cities should designate critical areas by using maps and performance
20 standards . . . However, because maps may be too inexact for regulatory purposes,
21 counties and cities should rely primarily on performance standards to protect critical
22 areas. Counties and cities should apply performance standards to protect critical areas
23 when a land use permit decision is made.

24 The Department of Commerce Minimum Guidelines also state that counties and cities
25 should identify and classify seasonal ranges and habitat elements where federal and state
26 listed endangered, threatened and sensitive species have a primary association and which,
if altered, may reduce the likelihood that the species will persist over the long term. Counties
and cities should consult current information on priority habitats and species identified by
the Washington Department of Fish and Wildlife (WDFW).¹⁶ The goal of fish and wildlife

¹⁵ WAC 365-190-130(3).

¹⁶ WAC 365-190-130(4)(a).

1 habitat conservation is to manage land so as to maintain species in suitable habitats within
2 their natural geographic distribution so that isolated subpopulations are not created.¹⁷

3 **2. Prior Compliance Orders**

4 In Case No. 97-1-0018 (Feb. 23, 2010 Compliance Order), the Board found Ferry County
5 out of compliance with the GMA relating to Critical Areas and Best Available Science (BAS)
6 as follows:

- 7 • Failure to include the best available science in developing policies and development
8 regulations to protect the functions and values of critical areas and to designate fish
9 and wildlife habitat, including priority species and habitats and species and habitats
10 of local importance [RCW 36.70A.060(2) and RCW 36.70A.170(1)(d)], or in the
11 alternative, include its own best available science to refute the science already in the
12 Record (RCW 36.70A.172).
- 13 • Failure to include best available science in developing policies and development
14 regulations to protect the functions and values of critical areas and in designating
15 protection for polygons from development projects adjacent to, as well as within
16 polygons [RCW 36.70A.172(1)]. (Board emphasis).
- 17 • Non-compliance for failing to comply with RCW 36.70A.040(3)(d) and RCW
18 36.70A.130(1)(d). The County's amended CAO is inconsistent and fails to implement
19 the County's Comprehensive Plan.

20 In Case No. 06-1-0003 (Mar. 3, 2010 Compliance Order), the Board found Ferry County out
21 of compliance with the GMA relating to Critical Areas and Best Available Science (BAS) as
22 follows:

- 23 • County failed to provide any scientific evidence or provide reasoned justification for
24 its departure from BAS in the Record to deviate from the DOE's recommended uses
25 in the Low Intensity Land Use, specifically agricultural, and is in non-compliance with
26 RCW 36.70A.060(2) and RCW 36.70A.172(1) of the GMA.

25 ¹⁷ *Stevens County v. Futurewise*, 146 Wn. App. 493, 511 (2008), excerpting from former WAC 365-190-080(5).

- County failed to designate fish and wildlife habitat and species, in particular habitat and species of local importance, or in the alternative, include alternative sources of best available science to refute the BAS submitted into the Record by WDFW and, therefore, fails to comply with RCW 36.70A.060(2), RCW 36.70A.170, and RCW 36.70A.172(1) of the GMA.

3. Recent Legislative Action by Ferry County

On July 25, 2011, Ferry County passed Ordinance #2011-01 updating Sections 7.4.15, 7.4.16, 7.4.17, and 7.4.18 of the Comprehensive Plan, relating to Fish and Wildlife Conservation Areas.¹⁸

On July 25, 2011, Ferry County passed Critical Areas Ordinance #2011-02 amending Critical Areas Ordinance # 2009-05, Sections 9.00, 9.01, 9.02, 9.03, and 9.04, relating to Fish and Wildlife Conservation Areas.¹⁹

On July 25, 2011, Ferry County adopted Resolution No. 2011-41 entitled "Findings of Fact for the Comprehensive Plan and Critical Areas Ordinance Relating to Fish and Wildlife Habitat Conservation Areas."²⁰

4. Positions of the Parties

Petitioners assert that Ferry County failed to include the Best Available Science (BAS) in designating Fish and Wildlife Habitat Conservation Areas, including (1) Areas with which endangered, threatened and sensitive species have a primary association, and (2) Habitats and species of local importance. Respondents argue that Ferry County (1) included Best Available Science in the record but need not follow such science, (2) designated Fish and Wildlife Habitat Conservation Areas in compliance with BAS, and (3) complied with the GMA's procedural and substantive requirements.

¹⁸ Ferry County's Index to Compliance Report, Attachment 1 (August 24, 2011).

¹⁹ Ferry County's Index to Compliance Report, Attachment 2 (August 24, 2011).

²⁰ Ferry County's Index to Compliance Report, Attachment 3 (August 24, 2011).

Petitioners further allege that Ferry County failed to include the Best Available Science in protecting polygon habitats from adjacent and nearby developments. Respondents argue that WDFW does not recommend a “one size fits all” standard regulatory buffer to protect habitat polygons and also the County has provided a reasoned explanation for any departure from BAS and thus has complied with the GMA.

5. Board Analysis – Designation of Fish and Wildlife Habitat Conservation Areas

The GMA requires counties to both **Designate** and **Protect** Fish and Wildlife Habitat Conservation Areas (FWHC Areas).²¹ Designation is a fundamental first step that informs County decision makers and the public on determining the location of FWHC Areas. The GMA’s mandate to protect FWHC Areas cannot be fulfilled unless people can figure out where FWHC Areas are located.

When designating Fish and Wildlife Habitat Conservation Areas, Best Available Science (BAS) must be included in the record -- the County must rely on scientific information and must analyze that information using a reasoned process, i.e., a scientific methodology. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 836-837 (2005).

WAC 365-195-905(2) provides that counties and cities “may use information that local, state or federal natural resource agencies have determined represents the best available science.” WAC 365-190-130(4) states that counties and cities “should consult current information on priority habitats and species identified by the Washington state department of fish and wildlife [WDFW].”

In the present case, Ferry County made the following Finding of Fact:

WHEREAS, based on public input, review and analysis of best available science (BAS) pertinent to Ferry County and other relevant information, the Planning

²¹ RCW 36.70A.170(1)(d); RCW 36.70A.060(2).

1 Department developed the Critical Areas Ordinance and Comprehensive Plan
2 proposal tailored to address the compliance orders;²²

3 But the Board must examine the entire record in this case to determine if Petitioners have
4 satisfied their burden to demonstrate that the County failed to include Best Available
5 Science as to FWHC Area designations and policy development.

6 Ordinance 2011-01, Section 7.4.17 entitled "Designation Policy" states that the "Critical
7 Areas Ordinance (CAO) shall define, classify, designate and regulate fish and wildlife
8 habitat conservation areas," and "habitat designation will be considered on a species by
9 species basis as to threats to the health, safety, welfare and economic impact affecting the
10 people of Ferry County." This Comprehensive Plan designation policy contains no reference
11 to including BAS, although an earlier version of the Comprehensive Plan did state that the
12 County "has considered best available science in developing the policies of the CAO" – this
13 quoted language on BAS was removed from the 7/15/2011 Comprehensive Plan Update, as
14 passed in Ordinance 2011-01.

15 Critical Areas Ordinance # 2011-02, Section 9.01 states that six habitat types shall be
16 classified fish and wildlife habitat conservation areas:

- 17 1) Areas with which endangered, threatened and sensitive species have a
18 primary association.
- 19 2) Habitats and species of local importance.
- 20 3) Naturally occurring ponds under 20 acres that provide fish or wildlife habitat
- 21 4) Rivers, streams and Lakes
- 22 5) Lakes, ponds, streams, and rivers planted with game fish by a governmental
23 or Tribal entity.
- 24 6) State Natural Area Preserves and Natural Resource Conservation Areas.

25 Ordinance 2011-02, Section 9.02 entitled "DESIGNATION" provides:

26 Habitat areas that meet the above classification criteria [Section 9.01] are
designated as fish and wildlife habitat conservation areas and are subject to the

²² Ferry County's Index to Compliance Report, Attachment 3, page 2 (August 24, 2011).

provisions of this ordinance and shall be managed with the Best Available Science on a site by site basis.

Thus, Section 9.02 "DESIGNATION" appears to be the main operative provision designating FWHC Areas in Ferry County and works in tandem with Section 9.01 "Classification."²³

Designation -- Endangered, Threatened and Sensitive Species

However, the Section 9.01 habitat classification "Areas with which endangered, threatened and sensitive species have a primary association," and explanatory language contains no reference to "habitats" but refers only to "species." WDFW Biologist Karin Divens had recommended "referring explicitly to the habitats primarily associated with the E/T/S species" so that "review of a development application is triggered not just by the occurrence of an individual species (some of which are highly mobile), but by considering development impacts to primary habitat for that species."²⁴ There is no evidence in the record of any scientific information that refutes the science provided by the WDFW Biologist on designating E/T/S habitats.

Ferry County has departed from or ignored the scientific recommendation by WDFW to designate E/T/S habitats not just species, without any reasoned justification. This ordinance language in Section 9.01(1) also contains no indication that BAS was included or analyzed with a reasoned process.

Section 9.01(1) merely refers to E/T/S species "listings" maintained by named federal and state agencies but does not provide any methodology for locating habitat areas. In reading the current language of Section 9.01(1), one cannot discern what habitat areas or locations

²³ Critical Areas Ordinance Section 9.04 refers to a map titled "Fish and Wildlife Habitat Conservation Areas of Ferry County" as showing the approximate location and extent of FWHC Areas for Endangered, Threatened and Sensitive species, but the map is not contained in the record. Furthermore, on March 2, 2011 the Colville Confederated Tribes commented on the Critical Areas Ordinance, stating that "Section 9.04 needs to have the Tribal Critical Habitat Maps added." However, the record does not contain these habitat maps, and the record does not reflect Ferry County's consideration of the Tribal Critical Habitat Maps.

²⁴ Appendices to Ferry County's Post-Hearing Supplemental Brief, Appendix 28 -- Letter to Ferry County from PHS/GMA Biologist Karin Divens of the Washington State Department of Fish and Wildlife, page 3 (July 5, 2011) [Underline added].

1 would meet the classification criteria for an “Area with which endangered, threatened and
2 sensitive species have a primary association.” Also, there are no maps showing the
3 locations of such designated areas. Thus, contrary to WAC 365-190-080(4), the County did
4 not use any maps and did not use performance standards to designate Fish and Wildlife
5 Habitat Conservation Areas.

6 Moreover, WAC 365-190-130(4)(a) states that counties should identify and classify
7 seasonal ranges and habitat elements where federal and state listed endangered,
8 threatened and sensitive (ETS) species have a primary association and which, if altered,
9 may reduce the likelihood that the species will persist over the long term. But the ordinance
10 language in Section 9.01 does not identify any seasonal ranges or habitat elements.

11 CAO Section 9.01 also contains no list of Priority Species with Endangered, Threatened or
12 Sensitive status, although such a list had been provided by WDFW to Ferry County.²⁵

13 **Designation -- Habitats and Species of Local Importance**

14 Regarding the classification “Habitats and species of local importance,” CAO Section
15 9.01(2) provides:

16 These habitats and species may be identified and nominated for inclusion or
17 removal as Habitats and Species of Local Importance by state agencies, Ferry
18 County, and local individuals, organizations or tribes. Review of a Habitat and
19 Species of Local Importance application is a legislative action, and shall be
20 processed during the Comprehensive Plan amendment cycle.

21 Section 9.01(2)(a) requires submission of a petition to nominate or remove an area or a
22 species, containing a number of items.

23 WAC 365-190-130(4)(b) states that counties and cities should identify, classify and
24 designate locally important habitats and species. Further, counties “should consult current
25

26 ²⁵ Letter to Ferry County from Biologist Karin Divens of the Washington State Department of Fish and Wildlife,
page 1 (July 5, 2010).

1 information on priority habitats and species identified by the Washington state department of
2 fish and wildlife.”

3 WDFW Biologist Karin Divens had recommended in pertinent part as follows:

4 WDFW is concerned that the process for nominating Habitats and Species of
5 Local Importance is overly burdensome. As written, the nomination process is
6 onerous because it would require applicants to propose specific and relevant
7 protection regulations, propose management strategies, provide specific habitat
8 locations, and requires an agency or qualified professional to prepare the
9 information. The only appropriate requirement for designation is that the
10 designation be based on Best Available Science. WDFW has not developed
11 management strategies for all priority species and habitats and therefore,
12 strongly suggests elimination of the management strategy requirement. The term
13 is not defined, and keeping this as a precondition will likely result in the loss of
14 many critical fish and wildlife resources. . . . Limiting designation to mapped
species and habitats is an overly burdensome expectation to include in a
nomination process. . . . not all habitats and species are mapped, and maps
cannot account for the movement of species seasonally and over time.
Therefore, we always recommend local governments designate species that are
vulnerable to future listing, such as Candidate species, and include a site-specific
review to verify the presence of a designated FWHCA. This should be the same
process for a listed species.²⁶

15 The ordinance language in Section 9.01 contains no indication that BAS was included or
16 analyzed with a reasoned process. The management strategy requirement in Section
17 9.01(2) is contrary to the strong scientific recommendation that (1) management strategies
18 do not exist for some species and habitats and (2) keeping this requirement will likely result
19 in the loss of many critical fish and wildlife resources. Furthermore, limiting designation to
20 mapped species and habitats is a departure from BAS since maps alone cannot account for
21 the movement of species seasonally and over time.

22 Moreover, as to the CAO’s designation of Habitats and Species of Local Importance,
23 WDFW stated:

24 ²⁶ Appendices to Ferry County’s Post-Hearing Supplemental Brief, Appendix 28 -- Letter to Ferry County from
25 PHS/GMA Biologist Karin Divens of the Washington State Department of Fish and Wildlife, pages 3-4 (July 5,
2011).

1 WDFW would like to reiterate that these sections fail to designate the majority of
2 locally vulnerable species and their associated habitats found in Ferry County.
3 The classification of "Habitats and species of local importance and habitats for
4 species of local importance appears to defer entirely to a nomination process.
5 Reliance on a future, potential nomination of local habitats or species does not
6 provide protection to those habitats and species currently known to exist in Ferry
7 County, based on best available science. We strongly encourage the county to
8 revisit its BAS on record and designate habitats and species of local importance
9 pro-actively.

10 In 2010, WDFW provided the County with a list of 31 Priority Species known to occur in
11 Ferry County with Federal and/or State Listing Status (ETS).²⁷ In 2011, the County
12 completed a review of 22 species for possible local importance designation.²⁸ None of those
13 species were designated, and the County's reasoning did not include a reference to
14 identifiable BAS or to a scientific methodology. For example, as to the decision not to list the
15 Golden Eagle, the reasoning was solely economic impact, with no reference to science.²⁹
16 For several other species the reasoning was that logging or grazing is "under other
17 jurisdictions," with no reference to science. Under the GMA, Ferry County can list whatever
18 species it deems appropriate if it supports its decision by BAS.³⁰

19 Ferry County asserts in briefing that the "reasoned justification" for departing from BAS does
20 not need to be based on science itself, and the County cites to *Swinomish Indian Tribal*
21 *Community et al. v. WWGMHB et al.*, 161 Wn.2d 415, 431 (2007).³¹ In the *Swinomish* case,
22 the Washington Supreme Court held that the GMA's requirement to protect critical areas
23 does not impose a requirement to enhance critical areas by, for example, requiring farmers
24 to replant areas adjacent to streams that were lawfully cleared in the past. The omission of
25 mandatory stream buffers from Skagit County's critical areas ordinance was a justified
26 departure from Best Available Science because the mandatory buffers would impose an

27 Ferry County's Post-Hearing Supplemental Brief, Appendix 21 (October 25, 2011).

28 Ferry County's Post-Hearing Supplemental Brief, Appendix 24 (October 25, 2011).

29 Id. at page 3.

30 *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 836 (2005).

31 Ferry County's Reply Brief in Support of Compliance Report, pages 12 (Sept. 29, 2011).

1 obligation to enhance that goes above and beyond the GMA's duty to protect.³² In other
2 words, BAS needs to be included in the decision-making process, but science cannot create
3 new duties not imposed by law.

4 In the present case, the record contains BAS relating to the designation and protection of
5 Fish and Wildlife Habitat Conservation Areas. But nothing in the record suggests that this
6 BAS would create any new duties not already imposed by law.

7 In 2005, the Washington Supreme Court held in a case arising out of Ferry County that BAS
8 requires the use of a scientific methodology and a reasoned process.³³ A county may depart
9 from BAS if it provides a reasoned justification for such departure.³⁴ In the 2005 Supreme
10 Court decision, the court noted:

11 The fact that the county's listing omits both the peregrine falcon and the bull
12 trout, both of which are ETS species known to be present in Ferry County, further
13 supports that the listing was not generated using BAS.³⁵

14 These holdings of the Supreme Court are mandatory authority, and this Board must adhere
15 to and apply the Supreme Court's rulings. In the present case, Ferry County failed to
16 provide a reasoned justification for departing from the Best Available Science in designating
17 habitats and species known to be present in Ferry County. As in the earlier Ferry County
18 Supreme Court case, the omission here of all 22 species of possible local importance
19 supports a finding that the ordinance was not generated using BAS.

20 Conclusion

21 As to designation of Fish and Wildlife Habitat Conservation Areas, the Board finds and
22 concludes as follows:

23 ³² *Swinomish Indian Tribal Community et al. v. WWGMHB et al.*, 161 Wn.2d 415, 430-431 (2007).

24 ³³ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 837-838 (2005).

25 ³⁴ *Swinomish Indian Tribal Community et al. v. WWGMHB et al.*, 161 Wn.2d 415, 430-431 (2007).

26 ³⁵ *Ferry County v. Concerned Friends of Ferry County*, 155 Wn. 2d. 824, 837 (2005).

- There is no substantial evidence in the record to support a County finding that BAS was included in designating Ferry County's Fish and Wildlife Habitat Conservation Areas.
- Ferry County failed to include the Best Available Science in designating (1) Areas where ETS Species have a Primary Association, and (2) Habitats and Species of Local Importance. Ordinance 2011-02 designations of Fish and Wildlife Habitat Conservation Areas (relating to ETS Habitats and Species, and Species of Local Importance) were clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.
- On remand, Ferry County should provide a reasoned justification for departing from Best Available Science in designating Fish and Wildlife Habitat Conservation Areas.

6. Board Analysis – Protection of Fish and Wildlife Habitat Conservation Areas

The Growth Management Act requires counties to include the Best Available Science in developing policies and development regulations to protect the functions and values of Fish and Wildlife Habitat Conservation Areas.

Protection – Habitat Polygons

In response to the Board's prior orders, Ferry County requested WDFW's opinion on Best Available Science regarding buffers adjacent to Fish and Wildlife Habitat polygons. WDFW's Priority Habitats and Species (PHS) program provides fish, wildlife, and habitat information to local governments for land use planning purposes. In a March 25, 2010 letter to Ferry County, WDFW's Priority Habitats and Species Biologist stated:

WDFW recommends that our Priority Habitats and Species (PHS) list and PHS mapped data be consulted and used to assist in designating Fish and Wildlife Habitat Conservation Areas under the Critical Areas Ordinance. The PHS data includes mapped habitat areas and species point and polygon data. This data is based on known observations in the field and science-based survey and mapping projects, but is incomplete as all areas have not been surveyed. WDFW does not have PHS requirements, but we offer the use of the information as a science-based technical assistance tool, that meets the best available science requirements under the Growth Management Act. . . .

1 Priority habitats are those with unique or significant value to species, based on
2 high density or diversity of fish and wildlife species, important breeding or
seasonal ranges, or important movement corridors. . . .

3 Priority species are those that WDFW has listed as State endangered,
4 threatened, or sensitive and those that are candidates for listing. . . .

5 Habitat areas associated with a priority species may be mapped as a point, line,
6 or polygon in the PHS GIS database. . . . WDFW does not require buffers on
mapped PHS points, lines, or polygons. WDFW may recommend particular buffer
7 distances for different types of disturbances or land uses, based on best
available science. . . .

8 As for regulatory buffers, (established distances from a certain point or polygon
9 that would require some kind of avoidance or mitigation action), WDFW does not
10 have a single, standard recommended buffer. WDFW does have regulatory
buffers for Bald Eagle territories and there are also regulatory buffers for some
11 species triggered by forest practices under the Department of Natural Resources
Forest Practice Rules.

12 Consistent with the Washington State Department of Commerce guidance,
13 WDFW does recommend that applicants look beyond their parcel boundaries for
potential impacts to critical areas that are not on their site. The establishment of
14 an area of project review adjacent to FWHCA is different than establishing a
regulatory buffer. Reviewing projects within an area adjacent to a mapped
15 habitat area allows for the County to consider whether the project should be
mitigated in some way to avoid adverse impacts. Commerce recommends that
16 the Critical Areas Ordinance require applicants to consider impacts to critical
areas on adjacent parcels, based on the maximum protection buffer that could be
17 required in a jurisdiction, or a standard distance, or a combination. The guidance
18 offers different approaches for this, acknowledging that one standard distance
may not be accurate.³⁶

19
20 Petitioners assert that Ordinance 2011-02, Section 9.04 violates the GMA because polygon
21 habitats are not protected from "adjacent and nearby developments . . . only development
22 proposals within the polygon habitats are protected."³⁷ In addition to protective buffers
23 adjacent to fish and wildlife habitat polygons, Petitioner Futurewise seeks some type of

24 ³⁶ Letter to Ferry County from PHS/GMA Biologist Karin Divens of the Washington State Department of Fish
and Wildlife, pages 1-3 (March 25, 2010) – Motion to Supplement the Record, Tab 502A (Sept. 7, 2011).

25 ³⁷ Objection to a Finding of Compliance & Petition for Imposition of Invalidity, page 7 (Sept. 7, 2011).

1 development review process for proposed developments located outside of habitat polygons
2 but nearby or adjacent to the polygon. Respondents argue that (1) neither the GMA nor
3 BAS require such buffers around habitat polygons, and (2) WDFW does not recommend a
4 “one size fits all” standard regulatory buffer that applies to all PHS mapped polygons.³⁸

5 The science in the record indicates that establishing an area of project review adjacent to
6 polygons is different from establishing an area of regulatory buffer adjacent to polygons.
7 The regulatory buffer would require some kind of avoidance or mitigation action within the
8 defined buffer area, whereas the project review process would consider options for potential
9 mitigation of impacts from the off-site project.³⁹

10 The BAS in this case does not support Petitioners’ suggestion for standard protective
11 buffers around all polygons. In fact, “WDFW does not recommend a single, ‘one size fits all’
12 standard regulatory buffer that would apply to all of our PHS mapped polygons.”⁴⁰ Rather,
13 WDFW recommends different buffer sizes for different species under different
14 circumstances. For example, the scientific record contains some species-specific buffer
15 recommendations for the Bald Eagle.⁴¹ In addition, a recent Stevens County court decision
16 held that (1) Best Available Science establishes that Lynx polygon buffers are necessary,
17 and (2) the failure of Stevens County to use BAS to adopt scientifically defensible buffers
18 adjacent to Lynx polygons violated the GMA.⁴² Thus, the BAS record here does not support
19 one-size-fits-all polygon buffers, but the record does support species-specific polygon
20 buffers.

21 ³⁸ Ferry County’s Reply Brief in Support of Compliance Report, pages 19-20 (Sept. 29, 2011).

22 ³⁹ Letter to Ferry County from PHS/GMA Biologist Karin Divens of the Washington State Department of Fish
23 and Wildlife, page 2 (March 25, 2010) – Motion to Supplement the Record, Tab 502A (Sept. 7, 2011).

24 ⁴⁰ Letter to Ferry County from PHS/GMA Biologist Karin Divens of the Washington State Department of Fish
25 and Wildlife, page 2 (April 26, 2010) – Motion to Supplement the Record, Tab 502A (Sept. 7, 2011).

26 ⁴¹ Letter to Ferry County from PHS/GMA Biologist Karin Divens of the Washington State Department of Fish
and Wildlife, page 2 (March 25, 2010) – Motion to Supplement the Record, Tab 502A (Sept. 7, 2011).

⁴² Memorandum Decision on Appeal from Growth Management Hearings Board, Stevens County Superior
Court Judge Rebecca (April 5, 2011) -- Motion to Supplement the Record, Tab 502A (Sept. 7, 2011). See also,
IR 502 - Washington State Recovery Plan for the Lynx, Washington State Department of Fish and Wildlife
(Stinson, D.W. 2001).

1 As to project review processes for proposals adjacent to mapped habitat points, lines, or
2 polygons, the BAS in this case recommends that nearby project proponents be required to
3 evaluate impacts and potential mitigation for proposals located within a specified distance of
4 mapped habitat. CAO Section 9.04(2) provides for such a review process for proposed
5 projects located within 1,000 feet of a documented point location for an ETS species, but
6 the County's process does not apply to proposed projects within some specified distance
7 from a polygon. This approach is not consistent with the BAS, which clearly recommends
8 project review both for areas adjacent to habitat polygons and for areas adjacent to habitat
9 points. As such, Ordinance 2011-02 represents a departure from BAS without any reasoned
justification, since the review process does not apply to mapped polygons or lines.

10 Finally, CAO Section 9.04, on page 48, has been amended to no longer require the
11 preparation of a Habitat Management and Mitigation Plan for a proposed development –
12 instead such a Plan “may” be required. The prior version of the CAO, Ordinance No. 2009-
13 05, provided that “Ferry County will require a Habitat Management and Mitigation Plan for
14 the proposed development, based on the report of the qualified professional and best
15 available science appropriate for the site (See Appendix B for details).”⁴³ This recent change
16 from a required Plan to a discretionary Plan is a departure from BAS without any reasoned
17 justification. WDFW's Biologist clearly recommended that this Habitat Management and
18 Mitigation Plan should be changed back to a required Plan in order to uniformly assess
impacts and determine sufficient mitigation for off-site projects.

19 Conclusion

20 As to protection of habitat polygons, the Board finds and concludes as follows:

- 21 • Petitioners failed to carry their burden of proof to demonstrate that standardized, one-
22 size-fits-all buffers are required for all types of habitat polygons; however Petitioners
23 did carry their burden of proof, in part, by demonstrating that Ferry County departed

24
25 ⁴³ IR 506 in Tab 506, excerpts from Ferry County Critical Areas Ordinance 2009-05 p. 45.

1 from BAS without a reasoned justification by failing to consider species-specific
2 buffers for Bald Eagle and Lynx polygons.

- 3 • Ordinance 2011-02, Section 9.04 does not adequately protect Fish and Wildlife
4 Habitat Conservation Areas as required by RCW 36.70A.060(2).
- 5 • There is substantial scientific evidence in the record to support a project review
6 process “triggered” by proposals within a specified distance of both habitat points and
7 habitat polygons. On remand, Ferry County should provide a reasoned justification if
8 it wishes to depart from BAS.
- 9 • There is substantial scientific evidence in the record to support the need for a
10 required Habitat Management and Mitigation Plan for proposed development, which
11 is triggered by being within a specified distance of a FWHC Area. On remand, Ferry
12 County should provide a reasoned justification if it wishes to depart from BAS.
- 13 • Ferry County failed to include the Best Available Science in developing policies and
14 development regulations to protect the functions and values of habitat polygons.
- 15 • Ordinance 2011-02, Section 9.04 as it relates to protecting habitat polygon areas
16 using species-specific buffers was clearly erroneous in view of the entire record
17 before the Board and in light of the goals and requirements of the Growth
18 Management Act.

15 B. WETLANDS

16 The Growth Management Act requires all counties and cities to adopt development
17 regulations that protect Critical Areas.⁴⁴ Counties and cities are required to include Best
18 Available Science in developing policies and development regulations to protect the
19 functions and values of Critical Areas.⁴⁵ The GMA defines the term “Critical Areas” as
20 including “Wetlands.”⁴⁶

21 In Case No. 06-1-0003 (Mar. 17, 2009 Second Compliance Order), the Board found and
22 concluded *inter alia*:

23
24 ⁴⁴ RCW 36.70A.060(2).

25 ⁴⁵ RCW 36.70A.172(1).

⁴⁶ RCW 36.70A.030(5).

1 The County failed to protect the functions and values of wetlands by arbitrarily
2 defining Low Intensity Land Use to include agriculture and residential uses
3 without providing reasoned justification for its departure from BAS found in the
4 record.

5 The Board finds and concludes the County failed to comply with RCWs
6 36.70A.172(1) and .060 and protect all the functions and values of wetlands. The
7 County's definition of Low Intensity Land Use allows agriculture and residential
8 uses within critical areas that are determined by the science presented in the
9 record to have detrimental effects on the functions and values of wetlands.

10 Petitioner Robinson argues that the latest version of Ferry County's Critical Areas
11 Ordinance, Ordinance 2011-02, Section 3.00 Definitions, still allows for agricultural use in a
12 Low Intensity wetland, contrary to BAS.⁴⁷ The County argues that such uses are
13 appropriate, for example in the case of hay production, one of the County's primary
14 agricultural activities.⁴⁸

15 But the Board's ruling in the Second Compliance Order is Law of the Case. The County has
16 not yet provided a reasoned justification for departing from BAS. Ferry County continues to
17 be in non-compliance with the GMA as to the Low Intensity Land Use definition for
18 Wetlands. The RCW 36.70A.560 Critical Areas deferral period for agricultural activities
19 expired on July 1, 2011.

20 Conclusion

21 As to protection of Wetlands, the Board finds and concludes as follows:

- 22 • Ordinance 2011-02, Section 9.04 as it relates to protecting Wetlands and the Low
23 Intensity Land Use definition was clearly erroneous in view of the entire record before
24 the Board and in light of the goals and requirements of the Growth Management Act.

25 **C. INVALIDITY**

26 For Ferry County's failure to protect polygon and line habitats, Petitioners request that the
Board impose invalidity for Ferry County's Future Land Use Map and apply the finding to all

⁴⁷ Petitioner's 4th Compliance Hearing Brief, page 7 (Sept. 7, 2011).

⁴⁸ Ferry County's Post-Hearing Supplemental Brief, page 3 (Oct. 24, 2011).

1 lands within 200 feet of the polygon and line habitats. For the County's failure to designate
2 and protect habitats and species of local importance, Petitioners request that the Board also
3 impose a finding of invalidity for the Future Land Use Map and apply invalidity to the
4 habitats all state and federal candidate species and all lands within 200 feet of those
5 habitats.⁴⁹ Respondent opposes invalidity and asserts that Petitioners have completely
6 failed to identify specific provisions that should be found invalid.⁵⁰

7 Under RCW 36.70A.302(1), the Board may determine that part or all of a comprehensive
8 plan or development regulations are invalid if the Board:

9 (a) Makes a finding of noncompliance and issues an order of remand under RCW
10 36.70A.300;

11 (b) Includes in the final order a determination, supported by findings of fact and
12 conclusions of law, that the continued validity of part or parts of the plan or
13 regulation would substantially interfere with the fulfillment of the goals of this
14 chapter; and

15 (c) Specifies in the final order the particular part or parts of the plan or regulation
16 that are determined to be invalid, and the reasons for their invalidity.

17 The Board agrees with Ferry County's assertion that Petitioners have failed to identify
18 particular parts of the plan or regulations that should be found invalid and that substantially
19 interfere with fulfillment of the goals of the GMA. As to the Future Land Use Map in
20 particular, Petitioners have failed to show how invalidity would protect any fish and wildlife
21 habitat or promote fulfillment of specific GMA goals. Accordingly, the Board declines to
22 issue a determination of invalidity at this time.

23 V. ORDER

24 Ferry County is not in compliance with the requirements of the Growth Management Act
25 relating to:

- 26 • Including the Best Available Science in designating and protecting Fish and Wildlife
Habitat Conservation Areas under RCW 36.70A.170, RCW 36.70A.060(2), and RCW
36.70A.172, and

⁴⁹ Objection to a Finding of Compliance & Petition for Imposition of Invalidity, page 34 (Sept. 7, 2011).

⁵⁰ Ferry County's Reply Brief in Support of Compliance Report, page 8 (Sept. 29, 2011).

1 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to
2 superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted
3 by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part
4 V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed
5 with the appropriate court and served on the Board, the Office of the Attorney General, and all parties
6 within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board
7 may be accomplished in person or by mail, but service on the Board means actual receipt of the
8 document at the Board office within thirty days after service of the final order. A petition for judicial
9 review may not be served on the Board by fax or by electronic mail.

10 Service. This Order was served on you the day it was deposited in the United States mail. RCW
11 34.05.010(19).
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